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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

No. 1343

THELBERT EARL O'KELLEY and
EUGENE THURMAN LANDERS, JR.,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the Court of Appeal of the State of California
First Appellate District, Division Two
1 Criminal 6003

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Come now—Petitioners above named, Thelbert Earl O'Kelley and Eugene Thurman Landers, Jr., acting through their counsel, and respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, in and for

the First Appellate District under date of November 27, 1967, affirming the judgments of conviction rendered in the Superior Court of the State of California, in and for the County of Solano, under date of September 2, 1966, as heretofore finalized by Order of the Supreme Court of the State of California on January 24, 1968, when a hearing was denied thereon.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, was not officially reported. The opinion is set forth in Appendix A to this Petition. No opinion was rendered by the Supreme Court of the State of California; its order denying a hearing on the Decision of the Court of Appeal is set forth in Appendix B. The oral proceedings had before the trial Court on Petitioners' motions for deposition of out-of-state material witness and for issuance of subpoena for out-of-state material witness is set forth in Appendix C.

JURISDICTION

The judgment of the Court of Appeal of the State of California, in and for the First Appellate District under date of November 27, 1967, was finalized by Order of the Supreme Court of the State of California on January 24, 1968, when a hearing was denied thereon. (Appendix B *infra.)* The jurisdiction of this Court is invoked under 28 U.S. Code 1257(3).

QUESTIONS PRESENTED

1. Whether the Petitioners were denied due process of law by the trial Court not granting their application and motion for certificate for issuance of subpoena for out-of-state material witness who was essential and material to the trial and defense of their case.

2. Whether the procedures resorted to in the Petitioners' case, which not only encouraged and facilitated the informer to leave the State of California, but repelled him from the State of California, denied Petitioners a fair trial and deprived them of due process of law.

STATUTES INVOLVED

The following statutory provisions are set forth in Appendix D, *infra.*

Constitutions:

California Constitution, Article I, Section 13;
California Constitution, Article 6, Section 4½;
United States Constitution, Sixth Amendment;
United States Constitution, Fourteenth Amendment.

Codes and Statutes:

California Health and Safety Code, Section 11530.5;
California Health and Safety Code, Section 11531;

California Penal Code, Section 686;
California Penal Code, Sections 1334.3, 1334.4, 1334.5;
Wisconsin Statutes Annotated, Section 885.33.

Federal Statutes:
28 U.S. Code 1257(3).

STATEMENT

In the early morning hours of December 31, 1965, Petitioners were arrested and subsequently formally charged with violation of Section 11530.5 of the Health and Safety Code of the State of California, to-wit: Possession for sale of marijuana; and violation of Section 11531 of the Health and Safety Code of the State of California, to-wit: Transportation of marijuana. Michael John O'Connell, an alleged informant, was the primary cause for the investigation and subsequent arrest of Petitioners herein.

Sometime prior to the aforesaid night, and around the fourteenth (14th) day of September, 1965, the alleged informant, O'Connell, was likewise arrested on two charges of violating the narcotics laws of the State of California, to-wit: Possession, transportation and sale of marijuana. (R.T. 18, 31, 32, 134, 5[illegible].) While still in jail, O'Connell, through Sergeant Lynch, talked to Sergeant Allbritton, both of the Vallejo Police Department, with regard to making a "deal." (R.T. 33, 184, 185, 186.) A "deal" and agreement was made wherein the pending criminal charges against O'Con-

nell would be dismissed in return for his cooperation and information leading to the arrest of Petitioners. (R.T. 185, 186.) On December 30, 1965, O'Connell was still charged with the aforementioned narcotics violation and was out on bail pending trial. (R.T. 63, 64.) Immediately following the arrest of Petitioners on December 30, 1965, O'Connell was released from custody and the pending criminal charges, which could legally and justifiably have been prosecuted against O'Connell were dismissed pursuant to the "deal" with the police department and the district attorney's office of Solano County. (R.T. 64-66, 68, 454, 496-497.) Thereupon Sergeant Allbritton advised O'Connell that he was at liberty to leave the State of California. (R.T. 31, 61, 62, 102, 103, 496.)

O'Connell did in fact leave the State of California, and subsequently returned in March, 1966. On March 15, 1966, O'Connell gave an oral statement to Charles M. Gianola, counsel for Petitioners herein, which statement was favorable to the defense of Petitioners' case. (C.T. 13-20.) On said date, Charles M. Gianola took immediate steps to make arrangements to surrender O'Connell to the office of the district attorney and to have a deposition taken at that time. However, upon arrival at the building, wherein the office of the district attorney is located, O'Connell fled, and the police were unsuccessful in their efforts to have him arrested. (R.T. 102, 112, 113, 501.)

Subsequent thereto, after notice of the informant's favorable statement to the petitioners, the district attorney saw his way to retaliate against O'Connell

for breaching his "deal" with the police in communicating with and giving information favorable to the defense, by recharging and reinstating the original criminal charge against him.

O'Connell was then arrested in the State of Wisconsin and extradition proceedings commenced.

On June 27, 1966, counsel for Petitioners, being greatly concerned that they have the personal appearance of O'Connell at the time of trial, made application for order for examination of material witness on commission, and application for certificate for issuance of subpoena for out-of-state material witness. (C.T. 30-35.)

After hearing arguments by respective counsel on these motions, the trial Court ordered that the motion for order for examination of material witness on commission be granted. (C.T. 36) (R.T.P. 2-14.) The trial Court further ordered that the Petitioners' motion for certificate for issuance of subpoena for out-of-state material witness be denied even on the condition that extradition be defeated. (C.T. 38; R.T.P. 14.)

The trial Court then vacated the original trial date of July 6, 1966, and reset the date of trial for August 16, 1966. (C.T. 38) (R.T.P. 15-16.)

Exactly as anticipated by Petitioners extradition was defeated by the informant in the State of Wisconsin on August 15, 1966, and Petitioners were forced to proceed with trial on August 16, 1966. (C.T. 55.) The trial continued through August 18, 1966, at which time the trial Court found Petitioners guilty of both

Counts I and II as charged in the information on file herein. (C.T. 63.)

On September 2, 1966, Petitioners were committed to the state prison for the term prescribed by law. (R.T.M. 56.) Execution of judgment of conviction was suspended and bail allowed pending appeal as to each Petitioner. (C.T. 106-109); (R.T.M. 62-63.)

Petitioners appealed the trial Court's decision to the Court of Appeal of the State of California, in and for the First Appellate District on the following grounds (in pertinent part) "1. The trial Court prejudically erred in not granting appellants' application and motion for certificate for issuance of subpoena for out-of-state material witness who was essential and material to the trial and defense of their case. . . . 3. The procedures resorted to in the instant case, which not only encouraged and facilitated the informer to leave the State of California, but repelled him from the State of California, manifestly denied appellants a fair trial and deprived them of due process of law . . ." The Court of Appeal filed its Decision, adverse to Petitioners, November 27, 1967. A copy of the Decision of the Court of Appeal is set forth in Appendix A, *infra.*

Petitioners' petition for hearing to the Supreme Court of the State of California was denied on January 24, 1968. A copy of such order is set forth in Appendix B, *infra.*

RAISING OF THE FEDERAL QUESTION

The Federal questions here presented were specifically raised on June 27, 1966, when counsel for Petitioners duly filed and made application for order for examination of material witness on commission and application for certificate for issuance of subpoena for out-of-state material witness. (C.T. 30-35.)

After hearing arguments by respective counsel on these motions, the trial Court ordered that the motion for order for examination of material witness on commission be granted. (C.T. 36); (R.T.P. 2-14.) The trial Court further ordered that the Petitioners' motion for certificate for issuance of subpoena for out-of-state material witness be denied even on condition that extradition be defeated. (C.T. 38); (R.T.P. 14.)

The trial Court then vacated the original trial date of July 6, 1966, and reset the date of trial for August 16, 1966. (C.T. 38); (R.T.P. 15-16.)

On the eve of the commencement of trial it was learned that O'Connell could not be extradited, thus forcing Petitioners to trial without said material witness.

On September 2, 1966, the Petitioners filed with the trial Court written notice of intention to move for a new trial. Petitioners contended that the trial court denied Petitioners of their constitutional right for the State to compel process for attendance of material witness at the time of trial. (R.T.M. 5.) The Motion was denied.

Petitioners appealed to the Court of Appeal of the State of California in and for the First Appellate District on the above ground, in addition to the flagrant denial of due process in the procedures resorted to by the People in repelling the material witness from the State of California. The appeal was denied November 27, 1967. A hearing by the Supreme Court of the State of California on the same grounds was denied on January 24, 1968.

REASONS FOR GRANTING THE WRIT

1. The Court below has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court. In holding that there was no error in denying Petitioners' repeated request that a subpoena issue for out-of-state material witness who was essential and material to the trial and defense of their case, the Petitioners were denied their Sixth Amendment right to compulsory process for obtaining a material witness in their favor.

The testimony and personal appearance of Michael John O'Connell was absolutely essential and material to the trial and defense of Petitioners' case herein. He was the only witness who was in a position to amplify or contradict the prosecution's witnesses, particularly with regard to the detailed facts relative to making a determination as to his reliability as an informer and, as such, he was a material witness for the Petitioners. Further, he was a material witness

with regard to amplifying or contradicting the prosecution's witnesses as to the detailed facts relative to making a determination as to the charge of possession for sale.

The Petitioners have the Constitutional and statutory right to confront and cross-examine witnesses and to obtain *compulsory* process for their production that have been guaranteed by Article I, Section 13, California Constitution, and the Sixth Amendment to the Federal Constitution, which has been held to be applicable to the states by virtue of the Fourteenth Amendment. (See *Pointer v. Texas,* 380 U.S. 400; 85 S. Ct. 1065, 13 L. Ed. 2d 923; see also *California Penal Code* Section 686.) Further, Section 1334.3 of the California Penal Code gave the trial Court power to issue a certificate that a person in another state is required as a material witness and have that certificate presented to a Court of the state in which such person is found if said state has provisions for commanding such person to testify in this state and, in this connection, Wisconsin has such provisions in its statutes. *(Wisc. S.A.* 885.33.)

The Petitioners' application and motion for certificate for issuance of subpoena for out-of-state material witness was properly and timely made. The trial Court in denying said application and motion without stating any reason whatsoever for such denial arbitrarily abused its discretion to the prejudice of Petitioners. In this regard, the argument of the District Attorney was completely fallacious and contradictory. In one breath he argued to the trial Court that he wanted

said material witness to be personally present in Court at the time of trial in order to subject him to direct cross examination before the trier of fact for the best ascertainment of the truth. (R.T.P. 10.) However, when confronted with the possibility that said witness might defeat the extradition proceedings which Petitioners were trying to protect themselves against, the District Attorney argued that it would be a travesty to permit said witness to personally testify because he would be exempt from the service of process. (R.T.P. 14.) As a consequence, the denial of Petitioners' rights to have the process of the Court to compel the attendance of witnesses on their behalf has resulted in a denial of due process of law and a palpable miscarriage of justice. *(California Constitution,* Article VI, Section 4½.)

In this regard, this Court, in the recent case of *Washington v. Texas,* 388 U.S. 14, 18 L. Ed. 2d 1019, 87 S.Ct. 1920, held that an accused's Sixth Amendment right to have compulsory process for obtaining witnesses in his favor was so fundamental that it could be considered incorporated in the due process clause of the Fourteenth Amendment, so as to be applicable in state trials. This Court in *Washington v. Texas,* 18 L. Ed. 2d 1019, at page 1023, cogently stated as follows: "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has

the right to confront the prosecution's witnesses for the purposes of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

This Court then went on to conclude at page 1025 of said case as follows: "We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use. The judgment of conviction must be reversed."

It is fundamental to a fair trial that the defendant be unhampered in the production of witnesses and other evidence in his behalf, and in the presentation of witnesses and evidence at the trial. (See Witkin, *California Criminal Procedure*, Section 349, page 341.) Indeed, the defendant's right to present an affirmative defense is a fundamental procedural and substantial right guaranteed by constitution and by statute. The right to present and cross-examine witnesses is essential to due process of law. (*Jennings v. Superior Court*, 66 Cal. 2d 867, 875.) That counsel for a defendant has a right to reasonable opportunity

to prepare for a trial is as fundamental as is the right to counsel. (*Jennings v. Superior Court,* 66 Cal. 2d 867, 876.)

The wrongful interference with a defendant in preparing for his defense of a criminal prosecution, in the opportunity to interview witnesses who have appeared before a grand jury in the proceedings leading up to the return of the indictment of the defendant, or witnesses whose statements given to the police or district attorney are the basis of a prosecution actually commenced, is a denial of due process and of the equal protection of the laws; and is violative of the right to have compulsory process for obtaining witnesses, which presupposes the right and opportunity to learn if a potential witness can testify to anything of a value to the defense. (See *People v. Mersino,* 237 Cal. App. 2d 265, 269; 46 Cal. Rptr. 821.)

The Court of Appeal in its decision was in error to hold that all parties expected the informer to be extradited to California. Contrary to this holding of the Court of Appeal, there was every reason to expect that the prosecution's efforts to return the informer to the state for prosecution on the reinstated criminal charge would not be successful. This was so, simply because of the fact that the prosecution in recharging and reinstating the original criminal charge was retaliating against the informer for breaching his "deal" with the police in communicating with and giving information favorable to the defense. Under these circumstances, it was highly likely that the Governor

of the State of Wisconsin would not grant extradition, which, in fact, is exactly what did happen. This course of events is exactly what the Petitioners were trying to protect themselves against in asking the trial Court to issue its certificate for issuance of subpoena for out-of-state material witness on condition that extradition be defeated. When it was learned on the eve of the commencement of the trial that the informer could not be extradited, Petitioners did not then ask for a continuance to renew their motion in view of the fact that the trial Court had in the first instance denied the motion on said basis. As such, it cannot be argued that Petitioners waived their right to have the witnesses subpoenaed when Petitioners were laboring under the belief that this could not be done in view of the trial Court's prior ruling.

The decision of the Court of Appeal in holding that the instant case is clearly distinguishable on several grounds from the cases of *Washington v. Texas,* 388 U.S. 14, 18 L. Ed. 2d 1019, 87 S. Ct. 1920; *Pointer v. Texas,* 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923; *People v. Dozier,* 236 Cal. App. 2d 94, 101; and *People v. Bossert,* 14 Cal. App. 111, 111 Pac. 115, is in error.

The decision of the Court of Appeal of the State of California is erroneous in holding that, "First, the testimony of O'Connell in the instant case bore only on the question of the reasonable cause for defendants' arrest and search, and not on the principal question of their innocence or guilt." This is simply not true because O'Connell could have been called upon to testify as to whether or not there had been a sale

or an attempted sale in connection with the charge of possession for sale.

The decision of the Court of Appeal of the State of California is also erroneous in holding that, "Second, the witness sought was not within the jurisdiction of the Court." This begs the question as the witness was within the jurisdiction of the Court pursuant to California Penal Code Section 1334.3. In *People v. Sauceda,* 199 Cal. App. 2d 47 (18 Cal. Rptr. 42), the Court stated at pages 56-57): "Furthermore, when at the time of trial, the defendant learned that the informer was in Missouri, he could have asked for a continuance to make use of the "Uniform Act to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, which has been adopted both in the State of California (Penal Code, Section 1334, et seq.) and the State of Missouri (Vernon's Annotated Missouri Statutes, Laws, 1959, H. B. No. 295, Sec. 491.400, et seq.)." In the instant case, the Petitioners did ask for a continuance to make use of said Act and were denied the same. Therefore, the trial Court prejudicially erred in not granting Petitioners' application and motion for certificate for issuance of subpoena for out-of-state material witness who was essential and material to the trial and defense of this case.

The fact that the informer was in the State of Wisconsin should be of no significance, with present day air travel as it is, as he could have been flown to attend the trial of this matter in a period of approximately four hours. In fact, the case of *People*

v. Bossert, 14 Cal. App. 111, 111 Pac. 115, is on all fours with the instant case. This case recognizes the fact that defendants in criminal cases are entitled to the presence of their witnesses and the benefit of their oral testimony. The testimony of witnesses given in Court is much more effective and far superior to that read in the form of a deposition. The defendant in the *Bossert* case had, as in the case at bar, regularly subpoenaed the witnesses in question. Their testimony was material and important to him. Nevertheless, the trial Court held that he was not entitled to the process of the Court compelling their attendance, and forced the defendant to submit his case to the trier of fact without the benefit of their oral testimony. By this ruling it was clear that the defendant was deprived of a constitutional right, for which the judgment and order were reversed and the cause remanded for a new trial.

The decision of the Court of Appeal of the State of California is also further erroneous in holding that, "Third, and most important, the peculiar facts of this case indicate a waiver of the rights that defendants here claim." Contrary to the holding of the Court of Appeal of the State of California, there was no unexpected unavailability of O'Connell, as the Petitioners had anticipated his expected unavailability by previously making their application and motion for certificate for issuance of subpoena for out-of-state material witness on condition that extradition be defeated. In the case of *People v. Avila,* 253 ACA 354, no application was made to produce the witness under

the applicable statutory section. Where, as in the instant case, however, a timely and proper application was made, the failure to issue such an order, upon proper showing, was prejudicial error. (See *People v. Avila*, 253 ACA 354, 377; *People v. Bossert*, 14 Cal. App. 111, 111 Pac, 115.)

The decision of the Court of Appeal of the State of California is further erroneous in holding that the trial Court, under the circumstances of the instant case, had the discretion under Penal Code Section 1334.3 to deny the Petitioners' motion to issue certificate for issuance of subpoena for a *material* out-of-state witness. This holding is in direct conflict with the case of *People v. Newville*, 220 Cal. App. 2d 267. In the *Newville* case, there was no proper showing that the witnesses sought to be subpoenaed were material witnesses. However, in the instant case, there was not only a proper showing that O'Connell was a material witness, but this was an admitted fact by all parties at all times, and, in fact, the Court of Appeal of the State of California found that, "There can be no question that under the circumstances of this case, O'Connell, as an informer-participant, was a material witness *(People v. Castedy*, 194 Cal. App. 2d 763, at page 768) and the prosecution so conceded at the trial." Therefore, under the circumstances of the instant case, and the rules set down by the case of *People v. Newville*, the trial Court committed prejudicial error and completely abused its discretion in denying the motion to compel the attendance of an out-of-state *material* witness. To have abused its

discretion in this manner is in complete derogation of fundamental constitutional requirements of due process of law.

Finally, the decision of the Court of Appeal of the State of California in considering the fact that "Under Section 1334.4, the state would have had to grant immunity to the witness as to all matters which occurred in the state prior to his return" is erroneous and unfair. It must be remembered that the state had previously, on its own motion, in effect granted O'Connell immunity by dismissing the pending criminal charge against him. The only possible reason for the state in recharging him with a crime previously dismissed was retaliation against him for breaching his "deal" and communicating with and giving information favorable to the defense. To hold otherwise would permit the state to reward the informer-participant-material witness with immunity conditioned on his not personally testifying for the defense in this State which again would be in complete derogation of all fundamental constitutional requirements of due process of law and concepts of fair play.

2. The procedures resorted to in Petitioners' case, which not only encouraged but facilitated the informer to leave the State of California, but repelled him from the State of California, denied Petitioners a fair trial and deprived them of due process of law.

The statement of Sergeant Allbritton, a police officer, to the informant to the effect that he was at liberty to leave the State of California, when coupled

with an accommodating dismissal of serious pending criminal charges against said informant pursuant to a "deal," clearly manifests an intention to render the informant immune from process of the Court to obtain his presence at the trial and thereby avoid the very purpose of the disclosure rule. The denial by the prosecution of an opportunity for the Petitioners to seek out the informer and to defend by those means, where the testimony of the informer would be material to the issues, is unfair and oppressive to the Petitioners and deprives them of due process of law. (See *Roviaro v. United States*, 353 U. S. 53, 63-64 [77 S. Ct. 623, 1 L. Ed. 2d 639]; *People v. McShann*, 50 Cal. 2d 802 [330 P. 2d 33]; *People v. Kiihoa*, 53 Cal. 2d 748, 752 [3 Cal. Rptr. 1, 349 P. 2d 673].) This situation was clearly aggravated and compounded by the prosecution when it recharged the informant with a crime previously dismissed, in retaliation against the informant for breaching his "deal" and communicating with and giving information favorable to the defense. When the prosecution recharged the informant for breaching his "deal" with the police, this course of action clearly repelled the informant from the State of California. As a consequence, the informant's absence from the State was not only encouraged, but was created and caused by the State. Under this set of circumstances, the risk that the informant could not be successfully extradited was great. In the final analysis, this was borne out by the fact that the prosecution was unable to successfully extradite the informant.

The case of *People v. Kiihoa,* 53 Cal. 2d 748 (3 Cal. Rptr. 1, 349 P. 2d 673) is directly analogous to the case at bar. In the *Kiihoa* case, the prosecution first arrested, then released and rearrested the defendant in order to avoid the necessity of identifying the informer at a time when the defendant could have procured the informer's attendance at the trial and have elicited testimony from him. In the instant case, the prosecution first charged, then dismissed and recharged the informer in retaliation for breaching his "deal" with the police by communicating with and giving information favorable to the defense. This course of action effectively repelled the informer from the State of California, and rendered him immune from process, particularly in view of the fact that extradition was defeated, and the trial Court refused to issue a subpoena for an out-of-state material witness even should extradition be defeated. The procedure resorted to in both cases manifestly denied the defendant a fair trial, just as effectively as if the informer had never been identified.

The fact is that the totality of State action in the instant case completely repelled the informer from the State of California and prevented the Petitioners from producing him at the time of trial as a witness in their own defense. As such, the decision of the Court of Appeal of the State of California is in error, even though there may have been no deliberate planning in the instant case. Therefore, the Petitioners were denied a fair and impartial trial under the principles of *People v. Kiihoa,* 53 Cal. 2d 748 (3 Cal.

Rptr. 1, 349 P. 2d 673) and the Sixth and Fourteenth Amendments to the Constitution of the United States of America.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari be granted.

Dated, Vallejo, California,
April 15, 1968.

Respectfully submitted,
LEGGETT, GIANOLA & DACEY,
By CHARLES M. GIANOLA,
Member of the Bar of the Supreme Court of the United States of America,
Counsel for Petitioners.

(Appendices Follow)

Appendix A

In the Court of Appeal
State of California
First Appellate District

DIVISION TWO

1 Criminal 6003

People of the State of California,
Plaintiff and Respondent,
vs.
Thelbert Earl O'Kelley and Eugene Thurman Landers, Jr.,
Defendants and Appellants.

OPINION
(Not to be published)

Defendants appeal[1] from a judgment of conviction entered after a court trial finding them guilty of possession and transportation of marijuana (Health & Saf. Code, §§11530.5, 11531). Defendants contend that they were convicted on the basis of evidence

[1]The respective notices of appeal indicate that the appeals are also taken from the orders denying their motions for a new trial. As these orders are not appealable, the purported appeals therefrom must be dismissed (Code Civ. Proc., §963).

obtained by an unlawful search and seizure, and that the court improperly denied their motion to produce the informer as a witness from out of state.

In August, 1965, the State Bureau of Narcotics and the Vallejo Police Department were investigating a narcotics case involving a four-apartment unit at 511 Wilson Avenue in Vallejo. As a result of this investigation, several arrests were made, including that of one O'Connell. After his arrest, O'Connell told Sergeant Allbritton of the Vallejo police that he knew quite a bit about the narcotics traffic and other things in Vallejo and asked if he could make a deal to get the charges dropped. Allbritton replied that the police could not promise anything, but O'Connell still wanted to help in the belief that he would be helping himself.

In addition to giving general information concerning narcotics activities, O'Connell told Allbritton that marijuana was being brought into Vallejo by both defendants, as well as by William P. Hansen and his wife Joan, by Elmer Lee Swimmer, and by Vernon Goose Anderson.[3] O'Connell also talked to State Narcotics Agent Nicolai and provided some information concerning a specific out-of-state situation that Nicolai knew to be accurate from other sources. Both defendants had been under investigation for narcotics activities in Vallejo for about three years. On one occasion, defendant O'Kelley gave information concerning Landers' involvement to a deputy sheriff, who

[3]Anderson's arrest, however, was not based on information obtained from O'Connell.

related it to Allbritton. State Agent Nicolai had heard about defendant Landers' narcotics activities several years earlier when he was on the Vallejo Police Department and also knew that Landers had been arrested for a narcotics violation in 1959.

O'Connell telephoned Allbritton two or three times a week with information. In the early part of October, O'Connell told Allbritton that Swimmer and Hansen were involved in the armed robbery of an Oakland service station. Sergeant Lynch was already investigating Hansen in connection with a service station robbery in Vallejo and considered him a suspect in the Oakland robbery. The information concerning Swimmer and Hansen was relayed to the Oakland police, who subsequently arrested them, at least in part on the basis of information that Allbritton had received from O'Connell. After the preliminary examination on December 15, Hansen confessed to Allbritton and Lynch that he and Swimmer had committed the Oakland service station robbery.

Between November 7 and 9, 1965, Claude R. Page, reported to the Vallejo police that Julie Easson, with whom he had been living, stole his gun, gave it to Jerry Cass and had gone to Arizona or New Mexico with Cass. Allbritton asked O'Connell to verify this matter. O'Connell did so and Miss Easson and Cass were arrested in Arizona on December 6, and returned.

On December 15, 1965, O'Connell met with Sergeant Allbritton and Agents Larkin and Banda of the State Bureau of Narcotics Enforcement and told them defendants had gone to Mexico and were preparing to

bring a large quantity of marijuana back to Vallejo around Christmas or New Year's. O'Connell was told to call Allbritton after defendants returned and that arrangements would be made for marked money and for a purchase by O'Connell at his apartment at 511 Wilson Avenue in Vallejo, with the police and narcotics agents overhearing the entire transaction. Subsequently, the substance of this conversation was passed on to Agent Nicolai of the State Bureau of Narcotics Enforcement.

Just before 10:00 p.m. on December 30, 1965, Allbritton received a telephone call from O'Connell indicating that defendants had returned and would meet O'Connell at his apartment around midnight to sell him marijuana. Allbritton called Nicolai who immediately left Sacramento for Vallejo in a state undercover car. About 11:00 p.m., Allbritton received a second telephone call from O'Connell who was told that the state agent had been contacted and should be there in time to furnish the marked money for the purchase. O'Connell indicated a willingness to use his own money, about $60, if he would be reimbursed.

About 11:30 p.m., Allbritton received a third telephone call from O'Connell indicating that he had been making calls from different locations and that it was time for him to return to his apartment to meet defendants. O'Connell was again assured that the state agent would be present. Nicolai arrived in Vallejo about 11:50 p.m., picked up Allbritton and Lynch, and drove with them to Wilson Avenue. They planned to give the marked money to O'Connell and to over-

hear the entire transaction from a vacant apartment adjacent to O'Connell's.

However, as the officers entered the five hundred block on Wilson Avenue, they saw defendant O'Kelley sitting in the driver's seat of a 1959 Cadillac on the west side of the street and defendant Landers walking about 40-50 feet away and just turning into the apartment building. Landers was not carrying anything. The officers continued to drive north on Wilson Avenue for about eight blocks, made a U-turn and as they drove back to 511 Wilson Avenue saw Landers and O'Connell walking toward the Cadillac. Neither was carrying anything. Landers and O'Connell got into the Cadillac which drove south and turned into the rear of the parking lot of Jay's, a nearby hamburger stand. Jay's was open for business with the proprietor and two customers inside. It was raining and the only entrance to Jay's was from the front.

The officers followed the Cadillac into the unpaved parking area at the rear of Jay's. There was nothing unusual about the Cadillac or its occupants. At this time, the officers, relying on the information from O'Connell and their knowledge that narcotics transactions commonly took place in out-of-sight locations, decided that the marijuana sale must be taking place in the Cadillac, and that the arrest should be made. Accordingly, the car with the officers pulled up to the Cadillac and stopped. Agent Nicolai stepped out, turned his flashlight into the Cadillac, and saw some paper money laying on defendant Landers' lap. The defendants were then arrested, warned of their constitutional rights and searched.

A wax paper bag of narcotics was found in Landers' pocket. Plastic bags containing marijuana were found beneath the front seat and in a suitcase in the trunk. About $79 in bills was scattered on the front seat and the floor of the car. O'Connell and defendants were booked. O'Connell was released that evening and on the next day told that the charge against him would be dropped and that he was free to leave the state which presumably he did. The officers filed charges against defendants for the possession and sale of marijuana with prior convictions.

Subsequently, on March 15, 1966, O'Connell was again in Vallejo for a brief time and gave a statement favorable to defendants. Thereafter he left the state, and the charge against him was immediately reinstated.

On June 27, 1966, defendants filed an application for an order for the examination of an out-of-state witness on commission and an application for a subpoena for O'Connell as a material out-of-state witness. At the hearing, it appeared that O'Connell was then in custody in Wisconsin and contesting the extradition proceedings instituted for his return by the state. As all parties expected him to be extradited to California, the court, after extensive argument, denied the motion for the issuance of an out-of-state subpoena but granted the motion for examination of the witness on commission and reset the trial for August 16, 1966, a date well after the Wisconsin extradition hearing scheduled for July 16.

Thereafter, both sides filed interrogatories and the commission was issued on June 30, 1966. On July 13, 1966, O'Connell responded to the interrogatories of the court commissioner in Milwaukee, Wisconsin. The information that Wisconsin had refused to extradite O'Connell was not received by either the prosecution or the defense until shortly before trial. No further defense motions to subpoena O'Connell were made prior to trial nor were any further continuances requested.

At the trial, the defense introduced O'Connell's responses to the interrogatories. O'Connell stated that he had never given any information to the police or any law enforcement officers about defendants or anyone else. He specifically denied being an informer or ever providing any information to any law enforcement agency about Jerry Cass, Julie Easson, William Hansen and Elmer Swimmer. O'Connell also denied making the telephone calls to Sergeant Allbritton on the night of December 30 and stated that he met with defendants that night only for the purpose of obtaining a hamburger. He stated that he had spent the entire evening of December 30 before midnight at the home of Penny Daul and that he did not use her telephone. O'Connell further stated that on the night of the arrest, he was released about 15 minutes after he had been placed in a cell and told by Sergeant Allbritton that the charges against him would be dismissed and that he should leave the state. He left thereafter and did not return until March 14. He

contended that on March 14, while driving on the interstate highway outside Vallejo, he again met Allbritton and was again told to leave the State of California and stay out. This was denied by Allbritton.

Sergeant Lynch testified that a deal had been made with O'Connell but Allbritton indicated that no deal with O'Connell had been made and that O'Connell was helping the officers in order to help himself.

Defendants first contend that there was no reasonable or probable cause for their arrest pursuant to Penal Code section 836[2] and that the court thus erred in admitting marijuana taken in an unlawful search and seizure.

To justify an arrest in reliance on the information received from an informer, he must be known to the officer to be reliable and must be a person whom the officer, in good faith, believes to be trustworthy (People v. Bates, 163 Cal.App.2d 847, 852). An arrest may be justified solely on the basis of information received from a single reliable informant (People v. Chavira, 253 A.C.A. 1025, 1028; People v. Boyd, 162 Cal.App.2d 332). A reliable informant may be one whose information has in the past led to valid suspects (People v. Dewson, 150 Cal.App.2d 119, 128). Reliability is demonstrated not only by past experience with the informer but also may be substantiated by

[2]Penal Code section 836 provides that "A peace officer may . . . without a warrant, arrest a person; . . . 3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony . . ."

the proven accuracy of the information given (People v. Cedeno, 218 Cal.App.2d 213, 219).

In the instant case, O'Connell was originally arrested for a narcotics violation and showed a general familiarity with narcotics. He not only gave information about an out-of-state narcotics situation that was known to be accurate from other sources, but provided information that led to the arrest of Swimmer and Hansen for an Oakland service station robbery and of Easson and Cass in Arizona after the Page gun theft.[4] All of this information proved to be substantially accurate and it cannot be questioned that the reliability of O'Connell as an informant had been established.

We must determine then whether the officers acted reasonably in arresting defendants in reliance on the total information they possessed (Willson v. Superior Court, 46 Cal.2d 291 at p. 294). There is no exact formula for the determination of reasonableness. Each case must be decided on its own facts and circumstances and the total atmosphere of the case (People v. Ingle, 53 Cal.2d 407, 412). The applicable test is: considering all the information in the hands of the police officers, would a reasonable police officer act on that information or would reasonable police officers seek further information before making the arrest (People v. Diggs, 161 Cal.App.2d 167, 171). In this case, the facts supplied to the officers by O'Connell, together with their observation of defendants' con-

[4]Although the record indicates several other instances of information provided to the officers by O'Connell, the officers indicated that their reliance was based on these two items of information.

duct with O'Connell on the night of December 30, amply justify the arrest and search in question.

Defendants argue that there was no reasonable probable cause for their arrest because the statements of an informer with whom a deal has been made are inherently incredible. They rely on the fact that in answer to an inquiry, O'Connell was told by the police that he had a right to leave the state, on the statement of Sergeant Lynch that a deal was made, and on the uncontroverted evidence that the charges against O'Connell were reinstated in March after he gave a statement favorable to the defense. Defendants ignore the testimony of Sergeant Allbritton that no deal was made but that O'Connell merely believed he would be helping himself by assisting the officers. The weight of the evidence and the disposition of any conflicts therein are for the trier of fact to decide (People v. Weathers, 162 Cal.App.2d 545).

But even assuming that a deal was made, the cases uniformly hold that in absence of specific testimony that the informer was deliberately encouraged to disappear, the courts cannot infer improper motives or activities on the part of the police (People v. Barone, 250 A.C.A. 883, 887; People v. Sauceda, 199 Cal.App. 2d 47 at p. 56; People v. Galvan, 208 Cal.App.2d 443, 447-448). The courts have gone so far as to hold that the prosecution may properly promise a witness immunity for his testimony (People v. Lyons, 50 Cal.2d 245, 265-266).

Defendants rely on People v. Kiihoa, 53 Cal.2d 748. There, the police freely admitted that the arrest

of the defendant had been postponed for the express purpose of allowing the informer to leave the state and thus of avoiding the adduction of his testimony, and the court properly held that the defendant was denied a fair and impartial trial. There was substantial evidence that no such deliberate planning or encouragement took place in the instant case.

Defendants next contend that the denial of their motion to produce the informer as an out-of-state witness, pursuant to section 1334.3 of the Penal Code, violates their Sixth Amendment right to compulsory process for obtaining a material witness in their favor. There can be no question that under the circumstances of this case, O'Connell, as an informer-participant, was a material witness (People v. Castedy, 194 Cal.App.2d 763 at p. 768) and the prosecution so conceded at the trial.

Defendants rely on Washington v. State of Texas, 87 Supreme Court 1920 (decided June 12, 1967). There, in a murder prosecution, a Texas statute disqualified as a witness, an accomplice who would have testified that defendant had tried to persuade him to leave and that the defendant left the scene of the crime before the accomplice fired the fatal shot. The Supreme Court held that the Sixth Amendment rights of an accused to have compulsory process for obtaining a witness in his behalf was a fundamental element of due process and applied to the states. Shortly before the Washington decision, the United States Supreme Court, in Pointer v. State of Texas, 380 U.S. 400, held that the right to confrontation of wit-

nesses guaranteed by the Sixth Amendment of the United States Constitution is made obligatory upon the states under the equal protection clause of the Fourteenth Amendment. Neither Pointer nor Washington resulted in any changes in the law of California, as the rights involved therein have long been recognized as necessary to constitutional due process, pursuant to article I, section 13 of the state Constitution, and subdivision 3 of section 686 of the Penal Code[5] (People v. Dozier, 236 Cal.App.2d 94, 101; People v. Bossert, 14 Cal.App. 111).

But we find the instant case clearly distinguishable on several grounds from the authorities cited in the preceding paragraph. First, the testimony of O'Connell in the instant case, bore only on the question of the reasonable cause for defendants' arrest and search and not on the principal question of their innocence or guilt. Second, the witness sought was not within the jurisdiction of the court. Third, and most important, the peculiar facts of this case indicate a waiver of the rights that defendants here claim.

After extensive argument, the court denied the defense motion, pursuant to section 1334.3 of the Penal Code, for the production of O'Connell as an out-of-state witness, but granted the motion for an order for the examination of O'Connell by an out-of-state commission. At the time of the denial of the motion, it was expected that O'Connell would be successfully

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[5]Section 686: "In a criminal action the defendant is entitled:

"3. To produce witnesses on his behalf. . . ."

extradited to California and the trial date was postponed to August 16 to allow ample time for the conclusion of the extradition proceedings in Wisconsin and the return of the witness. The fact that extradition was refused was not known until shortly before trial. The defense, however, did not request a continuance or renew their motion pursuant to section 1334.3 of the Penal Code, but rather chose to rely on O'Connell's Wisconsin deposition.

The only case decided in this state involving Penal Code section 1334.3 held that in view of the discretionary language of the statute, the granting or denying of a petition thereunder is largely discretionary with the trial court (People v. Newville, 220 Cal.App.2d 267, 274). Under section 1334.4, the state would have had to grant immunity to the witness as to all matters which occurred in the state prior to his return.[6] In People v. Kiihoa, supra, our Supreme Court carefully pointed out (at p. 754): "It is not intended to hold that the mere unavailability of a material witness would necessarily result in a denial of due process in every case." In People v. Dozier, supra, the court stated (at p. 105) that the existence of permissive legislation to obtain the presence of witnesses from out of state is not a requirement that the machinery thus provided be used in every instance. We find no contrary implications in Washington v. Texas and the other authorities cited by defendants.

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[6]In Earl v. United States, 361 F.2d 531 (C.C.A. D.C. 1966, cert. denied), the government's refusal to grant a discharged codefendant immunity (although it had the power to do so) and require him to testify for the defendant, was not a denial of due process.

In this case, when faced with the unexpected unavailability of O'Connell, the defense chose not to make use of the statutory machinery and voluntarily introduced into evidence the deposition taken in Wisconsin by the court commissioner. We think that by their failure to request a further continuance and renew their motion under Penal Code section 1334.3, after it became clear that O'Connell would not be extradited, defendants waived any purported rights under the Sixth Amendment or section 1334 of the Penal Code (People v. Avila, 253 A.C.A. 354, 369).

The deposition of O'Connell, as introduced, was exceedingly favorable to defendants and substantiated their version of the case rather than the prosecution's. Furthermore, it is inconceivable that the court would have disregarded the overwhelming evidence of O'Connell's involvement as a participant and informant, had he appeared as a witness. Thus, even if we assume the court's ruling to be error, O'Connell's absence at the trial was harmless to the defense beyond any reasonable doubt (Chapman v. California, 386 U.S. 18).

The purported appeals from the orders denying motions for new trial are dismissed. Judgment affirmed.

Taylor, J.

We concur:

Shoemaker, P. J.

Agee, J.

Filed November 27, 1967,
Lawrence R. Elkington, Clerk.

Appendix B

Order Due
January 26, 1968

Order Denying Hearing
After Judgment by the Court of Appeal
1st District, Division 2, Crim. No. 6003

In the Supreme Court of the State of California

In Bank

People

v.

O'Kelley et al.

Appellants' petition for hearing DENIED.

Traynor, Chief Justice.

Filed January 24, 1968,
William I. Sullivan, Clerk.
By R. C. Matteoli
Deputy Clerk

Appendix C

In the Superior Court of the State of California
in and for the County of Solano
Honorable Thomas N. Healy, Presiding

The People of the State of California, Plaintiff, vs. Eugene Thurman Landers, Jr., and Thelbert Earl O'Kelley, Defendants.	No. 4855

MONDAY, JUNE 27, 1966

The above matter came on regularly this 27th day of June, 1966, in the Superior Court of the State of California, in and for the County of Solano, before Honorable Thomas N. Healy.

The People were represented by Neal P. McCaslin, Esq. and Frank Fowles, III, Esq., Deputy District Attorneys for the County of Solano, State of California.

The Defendant Eugene Thurman Landers, Jr., was present and in attendance upon the Court and was attended and represented by his counsel, Charles Gianola, Esq.

The Defendant Thelbert Earl O'Kelley was present and in attendance upon the Court and was attended and represented by his counsel, John G. Soanes, Esq.

Christine Arneson, Official Shorthand Reporter, was present and acting.

The following proceedings were had and taken, to wit:

The Court: The People of the State of California versus Eugene Thurman Landers, Jr., and Thelbert Earl O'Kelley, Defendants, No. 4855.

Defendants are before the Court with their respective counsel, Charles Gianola and John G. Soanes.

This matter has been set down for trial by jury as to each defendant on July 6th, 1966, at 9:00 o'clock A.M.

What's the pleasure of counsel today?

Mr. Gianola: In your statement, "trial by jury", the trial by jury was waived and trial before the Court.

The Court: Correct. The minutes of April 25th indicate that a jury heretofore has been waived by each defendant. The matter is set down for Court trial for July 6th.

Mr. Gianola: Your Honor, I believe this morning that I filed the original of an Application for Order of Examination of Witness on Commission. Has the original of that Application been filed in the records before you?

The Court: Yes. I see it was filed this morning. To take the deposition of one Michael John O'Connell.

Mr. Gianola: That is true, your Honor.

The Court: The request is for a commission to take deposition and a continuance of trial. And this is interposed on behalf of each defendant, gentlemen?

Mr. Gianola: Yes, your Honor.

Mr. Soanes: I join in that motion.

The Court: Mr. McCaslin?

Mr. McCaslin: Your Honor, as it states in the document on file, and I do have some knowledge myself that the witness that they are asking to examine is under extradition proceedings from the State. As I understand it, there was some discussion between Court and counsel concerning a continuance for one month if this man's to be here.

The Court: Apparently defense counsel are apprehensive that in the event that extradition not be successful on the proposed witness, there will be no way of locating or having his testimony for trial purposes; is that correct, gentlemen?

Mr. Gianola: Yes, your Honor.

Mr. McClasin: I just now have been served with this Application for the Order and I would ask for —this is Mr. Fowles' case and such service upon me doesn't give me time to give any answer, and I would ask for time.

The Court: It was my general understanding that an appearance by Mr. Fowles with Mr. Soanes and Mr. Gianola was last Monday was it?

Mr. Gianola: Yes, your Honor.

The Court: Mr. Fowles indicated, while he was not altogether in favor of a continuance, he felt that he would have to agree to it; wasn't that his position at the time?

Mr. McCaslin: Was he aware of the Application for Order of Examination also?

The Court: In any such matter than in the presence of the defendants, on the record, with a proposed

continuance and the information that is desired for deposition purposes——

Mr. McCaslin: I would ask this of the Court: I would let the record indicate I do not disagree or will—I would object for the record to any order regarding examination of witnesses without a chance to look over the situation in the law and the pleadings here and have time to prepare an answer, or discuss it in any event. And, also, as I say, there is as much reason to believe at this time that extradition would be successful as unsuccessful. It's a felony matter that we're extraditing, one, and I have not yet had a state refuse to deliver a defendant that we have gone out after on a felony matter.

Let the record show I've just been handed a document entitled Interrogatories propounded to Michael O'Connell, which I haven't had time to look over, either, your Honor.

The Court: You desire this matter put over to this afternoon's calendar?

Mr. McCaslin: All right.

The Court: Then, if there are objections to the particular Interrogatories the matter can be resolved at that time and avoid a return to Court.

Mr. Gianola: We would like to make a further motion, Mr. Soanes and I, on behalf of respective defendants, that a Subpoena likewise be issued to compel the same Michael John O'Connell to appear at the trial of this matter. We feel should Mr. O'Connell be successful in the State of Wisconsin to defeat the extradition, we should have the right to have a subpoena to compel his appearance here.

The Court: That raises the problem for subpoena for out of state witnesses.

Mr. McCaslin: There's no need for the examination requested, your Honor.

The Court: We might research the law and that as to subpoena for an out of state witness, having in mind the distance entailed and the matter of fees and costs.

Mr. Soanes: The peculiarity is this: That the said Michael John O'Connell was originally arrested for the same offense for which he presently has the present warrant—fugitive warrant for his arrest, and that matter was dismissed in the Vallejo Municipal Court. And now he's been recharged with the same offense and Mr. O'Connell is in the State of Wisconsin; that is the only purpose why he's being extradited, is because of the fact that they—the prosecution want him out here to testify on their behalf. And it may well be that he might defeat the extradition and we certainly want him here as a witness for the defendants. We feel that in the interest of justice a subpoena should be placed in the State should he defeat the extradition.

The Court: And the matter is over to 1:30.

Mr. McCaslin: Just for the record, in answer to counsel's argument for the record, I think it's the Extradition Section I have had an opportunity to look into, your Honor, and I don't believe there's any right, either in Wisconsin or this State, to look behind the motives or reasons for the charge in asking the State, it's merely a question of: "Is this the

person wanted in this State" or proper complaint filed.

(Thereupon, the noon recess was taken.)

The Court: Now, on our criminal calendar for today, People versus Eugene Thurman Landers, Jr. and Thelbert Earl O'Kelley.

Further hearing passing the matter over this morning and an Order for Commission to take Deposition and for a continuance of trial presently set for three day trial for the Court, July 6th.

Mr. Fowles, what's your position on the motion?

Mr. Soanes: Your Honor, if I may interpose. Also I filed an Application for Subpoenaing the witness also. The declaration is substantially the same as the prior one by Mr. Gianola, except that it asked a certificate be issued by your Honor for a subpoena subpoenaing the witness to attend the trial.

The Court: That's in accord with the provisions of the cited Penal Code Sections?

Mr. Soanes: Yes, your Honor. Sections 1334, 1334.6.

Mr. Fowles: Your Honor, we would like to register or object to the granting of both motions and are prepared to argue on either motion, whichever your Honor would like to hear first. Perhaps it might be good, certainly for the continuity of the argument, if we took Mr. Gianola's motion first before proceeding to Mr. Soanes' motion. And, I'm prepared at this time.

The Court: There are three motions. There's also a motion for continuance of trial.

Mr. Fowles: I would join in a motion for continuance, your Honor. I would suggest and certainly request that the continuance not be for a period of over one month from the trial date, which I believe is set for July 6th at this point.

The Court: Very well. What about the motion for commission to take deposition?

Mr. Fowles: All right, your Honor. Looking at the law, it seems that all that need be required for a motion, the granting of a motion to take a deposition of an out of state witness is that one, a fact in issue be joined before the Court, which is the case here, then it states the defendant may have a material witness residing out of the state, examined in his behalf. . . . I'm quoting from Section 1349 . . . so hence it becomes important as to whether the witness is material. I believe from the various pleadings filed by Mr. Gianola, it would become apparent that if what is true as stated in the deposition is in fact true, that the person would be material. This is a witness they are relying on and I'm not contesting that. It specifically provides in Section 1353, the examination of the witness must be necessary to the attainment of justice. This is what your Honor must be convinced is the case before your Honor would issue such an order for a commission.

Now, I'd like to point out what the nature of this witness—who he is and also what testimony would be. Here we have a situation of an arrest without a warrant. This comes from Mr. Gianola's affidavit based on information given by a confidential reliable infor-

mant. It seems that the defense is in the position of having evidence that indicates that that reliable informant would testify differently if called here than police officers in Vallejo testified. Now, the Court is aware that this witness, Mr. O'Connell, is currently awaiting extradition proceedings in the State of Wisconsin. The District Attorney's Office has filed a Complaint against Mr. O'Connell, we're moving heaven and earth to get him back here. Now, if he's in this State there's no need to have an examination taken conditionally in another state. We have submitted our papers to the Governor. They have not been sent yet, but they were sent off last Friday. One of the reasons for joining in a motion for continuance is due to the fact that on July 16th there will be a hearing in Wisconsin, and at that time it will be determined whether Mr. O'Connell is going to be returned to this State, or if he is not going to be returned. It is true he is on bail, so assuming that our request for extradition is denied, well—conceivably he could then take off. It might be difficult to reinvolve him with the two defendants, but certainly he has appeared in Wisconsin every time he's had to for these extradition proceedings. He's out on bail there. He is and we are moving heaven and earth to get him back where he will be available to testify in court.

I think your Honor realizes that it's much better certainly for the ascertainment of truth in the case of these two defendants to have him present so the jury can see him testify, so there can be direct cross-examination in front of a jury, the trier of fact; and

this is all the District Attorney asks, if he is going to be examined, and if this testimony is going to come in in the case of the two defendants here, I would like him present in Court so we can all see the way he testifies for the ascertainment of truth.

Now, I have no reason to believe that this extradition is not going to be granted. On the other hand, being very frank with the Court, if it is not granted we would have a situation where it might be difficult to secure his attendance again to take a deposition. I would request a denial of the defense motion, Mr. Gianola's motion. Certainly that the witness be examined conditionally, at least until we ascertain whether we are going to have him here through extradition.

Mr. Gianola: A simple answer to the position of the prosecution here in his argument is it may be difficult to get the material witness back here, should he be able to beat the extradition in the State of Wisconsin. Right then and there he admits that in the interest of justice this material witness should have a certificate issued out of this Court to compel the taking of his deposition on a commission.

Now, this is simply answered by Section 1362 of the Penal Code, State of California, wherein it states: "The depositions taken under the commission may be read in evidence by either party on the trial, upon it being shown that the witness is unable to attend from any cause whatever." This presumes that if the witness is available and should he be returned to the State of California, that this isn't an answer for not taking the deposition on a commission. It's an ad-

mitted fact at the present time to locate this witness. The witness has removed himself from the State of California on at least two occasions. We had him originally in Vallejo and then he ran. He has now been located in the State of Wisconsin. He is strenuously resisting and fighting extradition, and then to return him to the State, the chances will be almost nil, and the prosecution here, first of all admits that he's a material witness and the Sections, if you read them in their entirety, the only issue is for the Court to determine whether or not Mr. O'Connell is a material witness. This is admitted by the prosecution. The prosecution here states that he was a confidential and reliable informant, that's the very issue we take issue with. We don't believe he was confidential or reliable and I have taken statements when he was in my office where he admitted he didn't make any such statements to the particular arresting officer to which the officer testified at the preliminary hearing.

Furthermore, I have been notified by an attorney in the State of Wisconsin that he has an addition of recent vintage, taken another statement from Mr. O'Connell wherein he completely denies this. And there can be nothing more detrimental to the defense of this should this material witness not be produced in the State of California. And I strenuously ask this Court at this time that issue of the deposition on commission to take the statements of Mr. O'Connell, while he is under bond in the State of Wisconsin, and the chances that he would remove himself

and secrete himself from the State of Wisconsin, are rendered somewhat remote at this time.

Mr. Fowles: Your Honor, I would feel like making one reply. Certainly, for the record at this point. The District Attorney's Office, I believe, on my part of the argument, did not enter into any offer of evidence that isn't subject to an affidavit. In other words, what goes on before another attorney, certainly all this is hearsay. I put this, that the hearsay that came in on defense argument. In any case, your Honor—

The Court: I will hear you now on motions for subpoena.

Mr. Fowles: All right, your Honor. On the motion for subpoena, I would argue just this: If said argument is granted it seems that Section 1334.4 of the Penal Code, exemption of witness while, here, if attendance of Mr. O'Connell is requested by this State and if it's granted and if he's brought here, he would be exempt of prosecution. Does this mean, your Honor, here I'm trying to extradite him, if this extradition is granted, does this mean that while he's here, certainly he's going to be exempt from prosecution? I don't think we can have it both ways. Either we're going to take his deposition back in Wisconsin or we're going to get him here, attendance of a witness outside this state. I would think that if we do one, certainly the other is not in order. I would think that in any case the provisions of Chapter 3A of the Penal Code, Attendance of a Witness Outside the State, specifically referring to: Requiring a witness to come here under bond and any exemption which must be given would be a travesty here. So then, we're going

to bring him into the State then exempt him, if he's here. It would present you difficulties—the case of the People versus O'Connell, to bring him in and let him go.

The Court: Mr. Soanes?

Mr. Soanes: Your Honor, on behalf of the motion, as has been said, Mr. O'Connell is presently under bond in Wisconsin. The subpoena could be set to be issued immediately after the extradition hearing, and if extradition was granted then the subpoena could become moot if extradition wasn't granted, then the subpoena could be argued and with the possibility of having the witness present here to give his testimony. And I'd also like to state that the prosecution has said that the prosecution wants to get Mr. O'Connell in this State to prosecute. I don't deny that, but I don't think it's pertinent to my position here, and my position here only concerns Mr. O'Connell and his testimony and this case.

Mr. Fowles: Your Honor, assuming that the extradition were denied back there, the Complaint is still outstanding in this State. This would mean that we'd be faced with the situation—Mr. O'Connell would be brought in the State where there's an outstanding Complaint already filed against him, where extradition has been tried, and he would be exempt from the service of that process while he were in the State testifying on this particular matter, and then leaving the State. Certainly, if Mr. Gianola's application is granted, assuming that he were not in the State because extradition were denied, well then we have the deposition to read in evidence. So where's the harm?

On the other hand, if extradition is granted while we have him back in the State, it would seem one motion to the other is surplusage in the interest of justice.

Prior to your Honor's ruling, and addressing Mr. Gianola's motion, is it my understanding, sir, that we're at this point discussing or arguing the fact as to whether a commission will be granted?

The Court: Yes.

All right, gentlemen. The motion for commission to take deposition by the defendants is granted. The defense counsel can submit appropriate forms of order and commission. And the defense motion for issuance of subpoena for an out of state witness is denied.

The motion unopposed or joined in by the prosecution for continuance of trial date here is granted. And, now, to avoid a need for further continuance, I wish to be as certain as possible, that the date now assigned will not be subject to further motion, if at all possible. I was looking at the date of August 2nd. Your next hearing on the matter of extradition is the 16th?

Mr. Fowles: Yes, your Honor.

The Court: If granted, this witness would be in the State, I would assume, by the 20th of July.

Mr. Fowles: Pardon me, your Honor?

The Court: If the witness is extradited to California from Wisconsin, then that hearing is completed on the 16th, I'm assuming he could be here by the 20th or 22nd of July, well in advance of this trial date.

Mr. Fowles: I would think that if I could make a suggestion as to having a trial date at a later time in the month of August, I would make such a suggestion

at this point. I have difficulty with one witness at that particular time, that's August the 2nd.

The Court: On August 16, your calendar apparently for the People versus McDonald?

Mr. Fowles: I believe People versus McDonald will not be going in any case, your Honor.

The Court: Is August 16 satisfactory to all counsel?

Mr. Gianola: Yes, your Honor.

The Court: Very well, this remains a non-jury proceeding?

Mr. Gianola: Yes, your Honor.

The Court: Set for Tuesday, August 16th, at 9:00 a.m. At which time the defendants, and each of them, are instructed to be present, prepared to proceed.

Yes, Mr. Fowles?

Mr. Fowles: My understanding, according to Section 1355 of the Penal Code, that once this commission is ordered, and I understand it is now ordered, the defendant must serve upon the District Attorney with a copy of Interrogatories. This has been done; I have received them today, with two days notice of time at which they will be presented to the Court or Judge. The District Attorney may in like manner serve upon defendant or his counsel, Cross-Interrogatories to the commission with a like notice. The District Attorney, for the record, does contemplate the serving.

The Court: Of Cross-Interrogatories?

Mr. Fowles: Of Cross-Interrogatories and I want to make that clear at this time. And also admit the fact that we have served this date of defendants' Interrogatories.

The Court: Well, I would propose, gentlemen, to provide that the Interrogatory and Cross-Interrogatories may be submitted to the Court.

Thursday morning, the 30th of June, agreeable?

Mr. Fowles: Yes, your Honor. If we have any objection to the form of question, and I'm sure the defense might have some objections to the form of question, Section 1355 indicates the Court or Judge must modify the question so as to conform them to the Rules of Evidence. Does your Honor contemplate a further hearing where any further objections could be raised as to the questions?

The Court: What's the thinking of counsel? I see no real occasion for it.

Mr. Gianola: No, your Honor.

The Court: They can stand submitted, and the Court will make any necessary modifications.

Mr. Fowles: All right, sir.

The Court: Counsel might look into the matter of the commissioner. You probably are already in agreement, or can be on identity of commissioner and have all papers ready for presentation to our Clerk for mailing.

Mr. Gianola: Your Honor, I have taken the liberty at this motion, unless the prosecution have located the commissioner in the name of Dominic H. Frinzi. And we would ask this commission be taken before him.

The Court: I'll call for either other nominations or acceptance of that Thursday morning and I'll say by 10:00 o'clock Thursday morning I'll want all these matters.

All right, gentlemen? Nothing further?

Mr. Gianola: Your Honor, will it be necessary for the respective defendants to be present on Thursday morning in connection with this matter?

The Court: I'm only anticipating a matter of submission of papers and review of them and delivery of them to the clerk for mailing. Have your addresses and envelopes all ready.

Mr. Gianola: Very well, your Honor.

Appendix D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the State of California

Article I, Section 13 of the Constitution of the State of California provides in pertinent part as follows:

> "In criminal prosecutions, in any court whatever, the party accused shall have the right . . . to have the process of the court to compel the attendance of witnesses in his behalf, . . ."

Article VI, Section 4½ of the Constitution of the State of California provides:

> "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Constitution of the United States of America

The Sixth Amendment to the Constitution of the United States of America provides in pertinent part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, . . ."

The Fourteenth Amendment to the Constitution of the United States of America provides in pertinent part as follows:

> ". . .; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

Codes and Statutes

California Health and Safety Code, Section 11530.5, provides in pertinent part as follows:

> "Every person who possesses for sale any marijuana except as otherwise provided by law shall be punished by imprisonment in the state prison for not less than two years or more than 10 years, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than two years in prison. . . ."

California Health and Safety Code, Section 11531, provides in pertinent part as follows:

> "Every person who transports, imports into this State, sells, furnishes, administers or gives away, or attempts to import into this state or transport any marijuana shall be punished by imprisonment in the state prison from five years to life and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than three years . . ."

California Penal Code Section 686 which provides in pertinent part as follows:

"In a criminal action the defendant is entitled:

1. . . .

2. . . .

3. To produce witnesses on his behalf and to be confronted with the witnesses against him, in the presence of the court, . . ."

California Penal Code, Section 1334.3, provides:

"If a person in any State, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions or grand jury investigations in this State, is a material witness in a prosecution pending in a court of record in this State, or in a grand jury investigation, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. This certificate shall be presented to a judge of a court of record in the county of such other State in which the witness is found.

If the certificate recommends that the witness be taken into immediate custody and delivered to an officer of this State to assure his attendance in this State, the judge may direct that the witness be forthwith brought before him. If the judge is satisfied of the desirability of the custody and delivery, for which determination the certificate shall be prima facie proof, he may order that the witness be forthwith taken into custody and delivered to an officer of this State. This order shall be sufficient authority to the officer to take the witness into custody and hold him unless and until he may be released by bail, recognizance, or order of the judge issuing the certificate.

If the witness is subpoenaed to attend and testify in this State, he shall be tendered the sum of ten cents a mile for each mile and five dollars for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the subpoena shall not be required to remain within this State a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If the witness fails without good cause to attend and testify as directed in the subpoena, he shall be punished in the manner provided for the punishment of any witness who disobeys a subpoena issued from a court of record in this State."

California Penal Code, Section 1334.4, provides:

"If a person comes into this State in obedience to a subpoena directing him to attend and testify in this State, he shall not, while in this State pursuant to the subpoena or order, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this State under the subpoena."

California Penal Code, Section 1334.5, provides:

"If a person passes through this State while going to another State in obedience to a subpoena or order to attend and testify in that State or while returning therefrom he shall not while so passing through this State be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this State under the subpoena or order."

Wisconsin Statutes Annotated:

885.33(2) *Extradition of witnesses in criminal actions*

(2) *Summoning witness in this state to testify in another state.* (a) If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing and shall make an order directing the witness to appear at a time and place certain for the hearing.

(b) If at the hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, and of any other state through which the witness may be required to pass by ordinary course of travel, will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached,

directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence, at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

(c) If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability, may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.

(d) If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of 10 cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and $5 for each day that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

JUN 26 1968

JOHN F. DAVIS, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

No. 1343

THELBERT EARL O'KELLEY and
EUGENE THURMAN LANDERS, JR.,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Petitioners respectfully request that this Court Grant rehearing of its order dated June 3, 1968, which denied certiorari and that the Court now grant certiorari and that a writ issue to review the judgment of the Court of Appeal of the State of California, First Appellate District, in the above entitled case, as prayed for in the petition filed April 19, 1968, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The petition for certiorari previously filed herein presented the question whether the petitioners were

denied due process of law by the Trial Court not granting their application and motion for certificate for issuance of subpoena for out-of-state material witness who was essential and material to the trial and defense of their case.

On April 23, 1968, and following the point of time that the instant petition for writ of certiorari was filed, a substantial intervening circumstance has taken place in that this Court rendered a decision in the case of *Jack Allen Barber, Petitioner, v. Ray H. Page, Warden,* 20 L. Ed. 2d 255, which case is directly analogous to the instant case and cogently supports the proposition that the petitioners herein were denied due process of law in violation of their Sixth and Fourteenth Amendment rights by the Trial Court not granting their application and motion for certificate for issuance of subpoena for out-of-state material witness who was essential and material to the trial and defense of their case.

Said case cogently supports the proposition that the petitioners herein had the absolute constitutional right to produce a material out-of-state witness and have his oral testimony heard at the time of trial in order that the trier of fact could properly judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. Regardless of the fact that the subject witness' deposition was favorable to the defense, the petitioners should not have been forced to introduce said deposition in lieu of having the benefit of his oral testimony at the time of trial. In fact, the case of *People*

v. Bossert, 14 Cal. App. 111, 111 Pac. 115, is on all fours with the instant case and supports this proposition. In that case the Trial Court held that the defendant was not entitled to the process of the Court compelling the attendance of material witnesses, and forced the defendant to submit his case to the trier of fact without the benefit of their oral testimony. By this ruling it is clear that the defendant was deprived of a constitutional right, for which the judgment and order were reversed and the cause remanded for a new trial. It would appear clear that this Court had this in mind when it stated in its recent case of *Barber v. Page,* 20 L. Ed. 2d 255, 258, as follows:

> "Many years ago this Court stated that 'The primary object of the [Confrontation Clause of the Sixth Amendment] . . . was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' *Mattox v. United States,* 156 US 237, 242-243, 39 L Ed 409, 411, 15 S Ct 337 (1895)."

Further, this Court appropriately held in said case of *Barber v. Page,* 20 L. Ed. 255, page 259, that whatever may have been the accuracy of the theory at one time that the mere absence of a witness from the

jurisdiction was sufficient ground for dispensing with confrontation on the theory that "it is impossible to compel his attendance, because the process of the trial Court is of no force without the jurisdiction, and the party desiring his testimony is therefore helpless," it is clear at the present time increased cooperation between the States themselves and between the States and the Federal Government have largely deprived it of any continuing validity in the criminal law. When the petitioners herein properly made their motion in the Trial Court to produce the material out-of-state witness at the time of trial, the State of California was under an obligation to make a request that the State of Wisconsin exercise its discretion to produce the material witness in question. The possibility of a refusal is not the equivalent of asking and receiving a rebuff. (*Barber v. Page,* 20 L. Ed. 2d 255, 260.)

Finally, to suggest that the petitioners herein waived any rights to confront or to the production of a material witness under the facts of the instant case is answered by this Court in *Barber v. Page,* 20 L. Ed. 2d 255, 260, wherein the Court states that such procedure "hardly comports with this Court's definition of a waiver as 'an intentional relinquishment or abandonment of a known right or privilege.'" (*Johnson v. Zerbst,* 304 U.S. 458, 464 (1938); *Brookhart v. Janis,* 384 U.S. 1, 4 (1966). Moreover, the right to confrontation or the production of a witness is basically a trial right. It includes both the opportunity to examine or cross-examine and the occasion for the

trier of fact to weigh the demeanor of the witness, which has been denied in the instant case.

CONCLUSION

For the reasons set forth above, and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeal of the State of California, First Appellate District.

Dated, Vallejo, California,
June 24, 1968.

Respectfully submitted,
LEGGETT, GIANOLA & DACEY,
By CHARLES M. GIANOLA,
Member of the Bar of the Supreme Court of the United States of America,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

CHARLES M. GIANOLA,
Member of the Bar of the Supreme Court of the United States of America,
Counsel for Petitioners.